IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. **CHRISTOPHER L. ADAMS**, Defendant.	Case No. CR02-37 **VERDICT AND JUDGMENT OF ACQUITTAL**

DATE OF TRIAL: (1) January 9, 2003, and, (2) February 3, 2003.

DATE OF RENDITION: February 3, 2003.

DATE OF ENTRY: See court clerk's file-stamp date per § 25-1301(3).

APPEARANCES:
For plaintiff: Thomas P. Herzog, Holt County Attorney.
For defendant: John P. Heitz with defendant.

SUBJECT: Verdict following bench trial.

PROCEEDINGS: At the trial, these proceedings occurred:

(1) January 9, 2003: See journal entry rendered contemporaneously therewith.

(2) February 3, 2003: The court pronounced the verdict and signed the verdict and judgment of acquittal.

FINDINGS: The court finds and concludes that:

1. The State charged the defendant with the crime of escape under § 28-912, which states that "[a] person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period." NEB. REV. STAT. § 28-912 (Reissue 1995). Service of a sentence to county jail for conviction of a misdemeanor clearly constitutes "official detention."

2. The facts are essentially undisputed. On March 28, 2001, the Holt County Court sentenced the defendant for operating a motor vehicle during time of suspension,

subsequent offense, to "ninety (90) days in the Holt County Jail commencing June 6, 2001, at 5:00 p.m." Exhibit 1. The sentencing judgment further stated: "The defendant is ordered to automatically report to the Holt County Jail on that date and time for execution of sentence." Exhibit 1. It then added: "The defendant is ordered to report to the Holt County Sheriff's office forthwith to be booked in and furloughed until June 6, 2001." Exhibit 1. On the same date in another case, the county court similarly resentenced the defendant for driving under suspension upon violation of probation to a 30-day sentence using substantially identical language. Exhibit 2. Contemporaneous commitments were issued in each case with "start date" on each commitment shown as June 6, 2001. Exhibits 4 and 5. The defendant apparently appeared before the sheriff on March 28 and signed a document entitled "Holt County Jail Furlough" stating that the defendant had reported to jail on a county court sentence and "is furloughed until June 6th 2001 5:00 pm." Exhibit 3 (date and time handwritten into blank space on form).

3. As the time approached for service of the sentences, the defendant requested his then-attorney's assistance in obtaining an extension for three weeks or "somewhere in that time frame." On June 4, the defendant's then-attorney submitted a written motion requesting an order "extending the Court's prior order suspending execution of the sentencing of incarceration in the Holt County Jail entered on March 28, 2001." Exhibit 6. The testimony clearly establishes that the defendant personally approved of the request and knew that it had been made. When he discussed the matter with his then-attorney's assistant, the assistant told him the motion had been submitted but the assistant did not then know whether the extension had been granted. On June 5, the county court entered an order that "execution of the sentence imposed by the Court in this matter shall be and is hereby extended to 9:00 a.m. on June 25, 2001 at which time the Defendant shall surrender himself to the Holt County Sheriff." Exhibit 7. Amended commitments were issued in each case with a "start date" now shown as June 25, 2001, at 9:00 a.m. Exhibits 8 and 9. The assistant's trial testimony establishes to this court's satisfaction that the assistant caused

copies of the signed and file-stamped motion and journal entry to be placed in the first class United States Mail, postage prepaid, and duly addressed to the defendant at his then-address at P.O. Box 34, Inman, Nebraska. The testimony further convincingly establishes that the envelope containing the copies was not returned by the United States Postal Service to the defendant's then-attorney. No evidence contradicted the presumption of delivery arising from the undisputed testimony of mailing. The copy of the journal entry mailed to the defendant clearly showed the new sentencing "start date" of June 25, 2001. Exhibit 10. The parties stipulated at trial that the defendant did not appear and surrender to the sheriff for execution of the jail sentence on either June 6 or June 25.

4. This court finds no other potential support for the county court procedure than § 29-2202 and §§ 47-401 to 47-411. Upon this court's inquiry during closing arguments, the plaintiff's attorney did not explicitly state the statute or statutes claimed to justify the procedures utilized by the county court in this instance. The defendant's attorney provided no additional assistance. Generally, criminal procedures exist only as prescribed by statute. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992). Although the parties were given the opportunity to submit briefs on the questions posed by the court relating to such statutory authority, neither party submitted any brief.

5. Sections 47-401 to 47-411 authorize granting a prisoner the privilege of leaving the jail for specific purposes. NEB. REV. STAT. § 47-401 *et seq*. (Reissue 1998). Nothing in the record establishes that the "furlough" procedure followed by the county court and the sheriff in this case was limited to the specific purposes authorized by § 47-401. More importantly, the privilege of leaving the jail does not suspend the running of a sentence. The concept that the sentence would have been running during the "furlough" in this case, together with a commitment providing for a "start date" at the end of the "furlough" period, would result in a sentence in excess of the maximum statutory penalty, which would clearly be unlawful. The concept of "furlough" directly conflicts with the

commitments issued by the county court. The commitments resolve the conflicting language in the sentencing judgments, determining that the execution of the sentences did not begin until the "start dates" specified in the commitments. This court concludes that the "furlough" procedure attempted by the county court lacked a statutory basis and those portions of the sentencing judgments purporting to require the defendant to be "booked in" to jail and "furloughed" are void.

6. However, the remaining procedure of the county court clearly finds support in § 29-2202. That section authorizes a sentencing court to "suspend execution of sentence for a period not to exceed ninety days from the date judgment is pronounced." NEB. REV. STAT. § 29-2202 (Reissue 1995). The section further states that "[i]f the defendant is not at liberty under bail, he may be admitted to bail during the period of suspension of sentence as provided in section 29-901." *Id*. The record in this case does not show whether the defendant was admitted to bail in the county court in either of the cases before that court prior to sentencing. But the release on recognizance clearly follows where the execution of sentence is suspended for the limited period authorized by § 29-2202. "All recognizances in criminal cases . . . shall . . . extend, when the court has suspended execution of sentence for a limited time, as provided in section 29-2202 . . . until the period of suspension has expired." NEB. REV. STAT. § 29-901 (Cum. Supp. 2002).

7. Section 29-908 creates the crime of failure to appear. NEB. REV. STAT. § 29-908 (Reissue 1995). That section also characterizes the bail procedure of § 29-901 as "releas[e] from *custody* under bail or recognizance or conditioned release . . . ." *Id*. (emphasis added). These statutes, when read together, declare that the defendant whose sentence is suspended for the limited period authorized by § 29-2202 is *released from custody* on recognizance, whether with or without further requirement of appearance bond or bail bond.

8. The Nebraska Supreme Court in *State v. Robinson*, 209 Neb. 726, 311 N.W.2d 7 (1981), expressly recognized that a defendant who is released following

imposition of sentence under a stay of execution with orders to reappear upon further order of the court has been "released from custody under . . . a conditioned release" within the meaning of § 28-908. In *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992), the Supreme Court held that if a convicted defendant, released under recognizance or a conditioned release, willfully fails to comply with a sentencing court's order to report to a court-designated officer who is legally authorized to take custody of convicted defendants, so that the defendant may commence serving an imposed sentence, the defendant's noncompliance is failure to appear before the court which sentenced and released the defendant and constitutes a violation of § 29-908.

9. This characterization as release from custody during temporary stay of execution of sentence is critical under the analysis of the elements of the crime of escape. In *State v. Dickson*, 205 Neb. 476, 288 N.W.2d 48 (1980), the Supreme Court stated that legal custody was an essential element of the crime of escape under the pre-code statute. In *State v. Hicks*, 225 Neb. 322, 404 N.W.2d 923 (1987), the Supreme Court observed that the language of § 28-912(1) is essentially the same as that found in the Model Penal Code and relied upon the Model Penal Code and Commentaries.

10. The Model Penal Code provision of escape "follow[ed] prevailing law at the time it was drafted . . . , including departure from certain kinds of 'constructive' custody such as work-release programs, furloughs, court appearances, and release to attend funerals or to visit sick relatives." Model Penal Code and Commentaries § 242.6, at 261-62 (1980). As the commentaries note, the definition of official detention specifically excludes "constraint incidental to release on bail." *Id.* at 264. Thus, once execution of a sentence has actually begun, the granting of the privilege of leaving the jail under § 47-401 *et seq.* constitutes a form of continuing, "constructive" custody. Consistent with that concept, § 47-411 explicitly characterizes willful failure to return as an escape.

11. But prior to the actual commencement of execution of sentence and during the time of suspension pursuant to § 29-2202, the release on recognizance, with or without

appearance bond or bail bond, constitutes a release from custody. The absence of custody precludes conviction for the crime of escape, which continues to require either actual or constructive custody.

12. The county court was not free to develop its own hybrid procedure and the procedure in this case cannot support a conviction for escape. Accordingly, the defendant must be adjudged not guilty and judgment shall be granted accordingly.

13. That is not to say that this court does not sympathize with the county attorney and the county court in the frustration over the inadequacy of § 29-908. That section limits prosecution for failure to appear to persons charged with a felony or to persons charged with a misdemeanor which would carry a jail sentence of more than 90 days. This effectively precludes application to most misdemeanors of Class III or below. However, the absence of sufficient sanction and specification of additional or different procedures or offenses must be addressed by the Legislature. Neither this court nor the county court is empowered to provide procedures in excess of statutory authority where the Legislature has failed to do so.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. Judgment of acquittal is entered on the sole count of the amended information charging the crime of escape.

2. The defendant's bond is released and discharged, and any surety thereon is exonerated.

Signed at **O'Neill**, Nebraska, on **February 3, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

[X] Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20_____ by _____.

[X] If not already done, immediately transcribe trial docket entry dictated in open court.
Done on _____, 20_____ by _____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: